

**MEMORANDUM OF AGREEMENT
BETWEEN
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10
AND
THE SPOKANE TRIBE OF INDIANS**

**REGARDING MIDNITE MINE
CERCLA ACTIVITIES**

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INTRODUCTION

This Memorandum of Agreement (“MOA” or “Agreement”) is entered into between the United States Environmental Protection Agency, Region 10 (“EPA”) and the Spokane Tribe of Indians (“Tribe”) (together “the Parties”) to address response actions taken pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601, *et seq.* at the Midnite Mine (“Site”) located on the Spokane Indian Reservation. EPA has included the Site on the National Priorities List (“NPL”) pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605. 65 Fed. Reg. 30482 (May 11, 2000). The Site consists of all contaminated areas within the Midnite Mine, as well as any other locations to which contamination from the Midnite Mine has come to be located, or from which that contamination came.

I. PURPOSE

The Tribe and EPA have an on-going government-to-government relationship pursuant to federal Indian policy, Executive Order 12875 (October 26, 1993), and White House Directive dated April 29, 1994, 59 Fed. Reg. 22951 (May 4, 1994), and recognized by a Tribal Environmental Agreement between EPA and the Tribe dated January 9, 1997.

Additionally, the Spokane Tribe of Indians is afforded substantially the same treatment as a State in accordance with Section 126 of CERCLA, 42 U.S.C. § 9626, and 40 C.F.R. § 300.515. The Tribe and EPA share a common interest in response and enforcement actions at the Site because EPA has added the Site to the NPL pursuant to Section 105 of CERCLA, the Site includes portions of the Spokane Indian Reservation and property the United States holds in trust for the Tribe and its members, and involves other trust resources of the Tribe. The MOA is intended to provide a framework for good faith government-to-government coordination of CERCLA response activities conducted at the Site and to further the policy of the United States and EPA to consult with tribal governments before taking actions which may affect tribal rights and resources. Consistent with EPA's trust responsibility to the Tribe and the consultancy relationship between EPA and the Tribe, this MOA will best enable EPA to fully consider the rights and concerns of the Tribe during the development of response activities at the Site and prior to making decisions that affect the Tribe. It is acknowledged that additional agreements may be executed between the Tribe and EPA to further meet the above described purposes.

II. AUTHORITY

The Tribe and EPA enter into this MOA in accordance with their authority under Sections 104(c)(2), 121(f), and 126(a) of CERCLA, as amended, 42 U.S.C. §§ 9604(c), 9621(f), and 9626(a), the National Contingency Plan ("NCP"), 40 CFR § 300.500, *et seq.*, and other applicable Federal and Tribal law.

Pursuant to 40 C.F.R. § 300.505(b), the EPA Regional Administrator has authority to enter into this MOA with the Tribe as a government concerning CERCLA response activities at the Site.

The Chairman of the Spokane Tribal Business Council (“Tribal Chairman”) is the lead authorized official for the Tribe pursuant to Spokane Tribal Business Council Resolution 2001-87. Pursuant to 40 C.F.R. § 300.505, 300.515(b), the Tribal Chairman has authority to enter this MOA with EPA.

III. SCOPE

This Agreement establishes the nature and extent of EPA and Tribal interaction during CERCLA response activities at the Site, including the Remedial Investigation/Feasibility Study and related cleanup measures.

IV. OBJECTIVES

The Tribe and EPA shall coordinate on a government-to-government basis their efforts to meet their respective responsibilities under CERCLA and other applicable Federal or Tribal law to address contamination associated with the Site. This Agreement provides a framework for such coordination in accordance with Section 121(f)(1) of CERCLA, 42 U.S.C. § 9621(f)(1) and 40 C.F.R. §§ 300.505, 300.515. The Tribe and EPA agree to work together during the cleanup process to achieve the following objectives:

A. Tribal participation in EPA’s development of CERCLA response actions at the Site, including any long-term operation and maintenance activities and any five-year reviews, and prompt notice and explanation of each proposed action at the Site.

B. A reasonable opportunity for the Tribe to review and comment on documents related to the response actions at the Site, and to receive responses to such comments.

C. Notice to the Tribe of negotiations with potentially responsible parties regarding any response action at the Site and an opportunity to participate in such negotiations and, subject to applicable limitations of CERCLA, to be a party to any settlement.

D. Access to the Spokane Indian Reservation for purposes of conducting response actions under CERCLA.

E. Timely identification of Tribal applicable or relevant and appropriate requirements (“ARARs”), to-be-considered (“TBC”) criteria, and substantive requirements of any applicable Tribal permits.

F. Resolution of issues of concern related to any response action at the Site in a timely and cooperative manner.

G. Tribal concurrence in deleting the Site from the National Priorities List.

V. AGREEMENTS

A. With respect to Objective A, the parties agree to the following:

(1) The EPA Project Manager and the Tribal Coordinator will communicate regularly by phone, correspondence and meetings, to review the status of work at the Site and to resolve any existing or anticipated technical issues. At minimum, such communications shall take place quarterly.

(2) The Tribe will advise EPA regarding any issues and concerns of special interest to the Tribe.

(3) The Tribe will assist EPA in identifying and communicating with Tribal members who can provide information concerning the Site.

(4) EPA legal counsel and Tribal legal counsel will regularly communicate regarding legal issues.

(5) EPA will provide the Tribe with reasonable prior notice of and an opportunity to participate in key meetings with EPA contractor(s), potentially responsible parties, or other federal agencies. If the Tribe is unable to participate in such key meetings, EPA will provide the Tribe with a summary of the issues and discussions that occurred, if requested. EPA will further provide the Tribe on a regular basis a summary of other meetings with potentially responsible parties or other federal agencies at which response related issues are discussed.

B. With respect to Objective B, the parties agree to the following:

(1) In accordance with Section 121(f)(1)(E) of CERCLA, 42 U.S.C. § 9621(f)(1)(E) and 40 C.F.R. 300 Subpart F, EPA will provide a reasonable opportunity for the Tribe to review and comment on the following:

(a) The Remedial Investigation/Feasibility Study Report (“RI/FS”) and all data and technical documents leading to its issuance, including but not limited to the RI/FS Work Plan, the Quality Assurance Project Plan (“QAPP”), the Sampling and Analysis Plan (“SAP”), the Human Health Risk Assessment Work Plan, the Ecological Risk Scoping documents, Phase I and Phase II Data Reports, Site Characterization Summary,

Treatability Study documentation, Memorandum of Remedial Action Objectives, Memorandum of Development and Preliminary Screening of Alternatives, Alternatives Screening Results and Final Screening, and Detailed Analysis Memorandum.

(b) The Proposed Plan summarizing the detailed and comparative analysis of remedial alternatives and identifying the preferred remedial alternative.

(c) The Record of Decision (“ROD”) selecting the remedial action.

(d) The Remedial Design (“RD”) and all data and technical documents leading to its issuance.

(e) Any proposed determinations on potential applicable or relevant and appropriate requirements (“ARARs”) or criteria to be considered (“TBCs”).

(f) Any other technical data and reports related to implementation of the remedial action.

(2) In accordance with 40 C.F.R. § 300.515, the Tribe will provide comments to EPA on the RI/FS, Proposed Plan, ROD, RD, and any proposed determinations on potential ARARs and TBCs within a minimum of 10 working days and a maximum of 15 working days, and for each other deliverable, within the time frame specified by EPA. EPA and the Tribe acknowledge that timely review of deliverables is essential. If the Tribe determines that additional time is required for its review, the Tribe will discuss the need for a reasonable

amount of additional time (normally 14 days or less) with EPA, as soon as the need is identified.

C. With respect to Objective C, the parties agree to the following:

(1) Prior to entering negotiations with any potentially responsible party regarding any response action connected to the Site, EPA shall provide to the Tribe written notice of, and a reasonable opportunity to participate in, such negotiations, and subject to applicable limitations of CERCLA, to be a party to any resulting settlements.

(2) Within fourteen (14) days of receiving written notice of EPA's anticipated negotiations or settlement with any potentially responsible party, the Tribe shall, in writing, notify EPA of the Tribe's intent to participate in such negotiations or settlement.

D. With respect to Objective D, the parties agree to the following:

(1) The Tribe acknowledges that EPA has a right of access to the Site under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). In order to facilitate response activities at the Site, the Tribe, in recognition of Federal law and not by way of permit, license, agreement, lease or other form of authorization, and solely to the extent of the Tribe's trust beneficiary or other interest in a portion of the Site, agrees to provide access to the Site to EPA, and to its authorized representatives and contractors, to perform CERCLA response activities authorized by EPA and for all purposes allowed by Federal law.

(2) The Tribe agrees to provide access to the Site to EPA and its contractors to perform CERCLA response activities except when its lawful authority to do so is limited, such as when access to fee or trust allotments is needed.

(3) The Tribe will be given reasonable notice of requests for Site access and will be afforded the opportunity to accompany all formal visits to the Site by EPA officials and all significant field activity by EPA and its contractors.

E. With respect to Objective E, the parties agree to the following:

(1) EPA, as the lead agency, will determine ARARs and TBCs for the Site. In accordance with 40 CFR 300.515(d)(2) and 300.515(h)(2), EPA will request potential ARARs and TBCs from the Tribe no later than the time that the site characterization data are available. After the initial screening of alternatives is completed but prior to the detailed analysis phase of the FS, EPA will request the Tribe to identify any additional ARARs or TBCs. The Tribe will identify its potential ARARs and TBCs within thirty working days of receipt of EPA's request. The written identification should include a citation to each ARAR or TBC, including any substantive requirement of any applicable permit, a reference to whether the requirement is applicable or relevant and appropriate, and a description of how the ARAR or TBC affects the Site. EPA will thereafter consult with the Tribe to ensure that identified ARARs and TBCs are updated as appropriate. EPA and the Tribe acknowledge that it is EPA policy that Tribal requirements are subject to the same criteria as states as described in 40 C.F.R. § 300.400(g)(4). See 55 Fed. Reg. 8741-8742 (March 8, 1990).

(2) EPA will consult with the Tribe prior to any waiver of an ARAR under Section 121(d)(4) of CERCLA.

F. With respect to Objective F, the parties agree to the following:

(1) Issues related to the response action at the Site should be resolved at the EPA Project Manager and Tribal Coordinator level. In the event that an issue cannot be resolved, the Tribal Coordinator or EPA Project Manager may elevate the unresolved issue to the level of Director of the Natural Resources Department for the Spokane Tribe and the EPA Director of the Environmental Cleanup Office, respectively. If the issue is not resolved at this level, the EPA Regional Administrator, after consulting with the Tribal Chairman, will make the final decision.

G. With respect to Objective G, the parties agree to the following:

(1) EPA will obtain concurrence from the Tribe regarding deletion of the Site from the NPL in accordance with 40 C.F.R. § 300.425(e).

VI. MISCELLANEOUS PROVISIONS

A. Effective Date; Amendment and Termination. This Agreement shall be effective when executed by the Parties and may not be amended except by written agreement of both EPA and the Tribe. This Agreement shall continue in effect until terminated by agreement of EPA and the Tribe, provided, however, that either party may terminate its participation in the Agreement upon giving sixty (60) days written notice to the other Party or as otherwise provided for herein.

B. Commitment of Resources. Nothing in this Agreement shall be construed as obligating EPA, the Tribe, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

C. Reservation of Rights. It is recognized that each Party to this Agreement has and reserves all rights, powers and remedies now or hereafter existing at law or in equity, or by statute or otherwise, and that nothing in this Agreement waives or forecloses the exercise of any such rights, powers or remedies. The Tribe's joinder to this Agreement and its participation in the CERCLA process shall not constitute a waiver of sovereign immunity by the Tribe.

D. Confidentiality. This MOA is intended to provide a mechanism for the exchange of information between EPA and the Tribe about decisions and actions at the Site under CERCLA consistent with EPA's trust responsibility to the Tribe. The Parties agree that sharing information related to the Site will best enable EPA to satisfy its trust and legal obligations and responsibilities to the Tribe while conducting CERCLA activities at the Site. The Parties intend to exchange information as part of the process of government-to-government consultation concerning response actions at the Site and during the development of enforcement actions against potentially responsible parties. EPA requests the Tribe consult with and provide information to EPA, including the Tribe's views on factual, policy and legal issues for consideration prior to either Party taking actions involving the Site. In order to ensure meaningful consultation, the Parties intend to keep confidential certain information shared and will seek to protect such information from disclosure and discovery through the use of various privileges and exceptions, including but not limited to, attorney-client, pre-decisional and deliberative process, and attorney work product privileges. To avoid interference with an enforcement proceeding in which the Parties have a common interest, the

Parties will protect from disclosure any law enforcement records exchanged in anticipation of litigation. The Parties agree to maintain any and all rights and privileges, to the extent permitted by law, including the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, that may pertain to any shared information. Whenever sharing information deemed confidential, the Party shall clearly mark any information to which it asserts a privilege as "Privileged and Confidential Information - Do Not Release Without Authorization." The Party receiving information so marked agrees not to release, or allow to be released, such information to the extent permitted by law. The Parties agree that failure to so mark information developed or shared does not preclude the Parties from asserting the protections under FOIA or from asserting privileges and exceptions in seeking to protect the information from discovery, and that the exchange of information is not intended to waive any litigation privileges applicable to the information under Tribal, State or Federal law.

//s//

BRUCE WYNNE
Chairman, Spokane Tribal
Business Council

//s//

CHARLES E. FINDLEY
Acting Regional Administrator
Region 10
U.S. Environmental Protection Agency

DATE

DATE